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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMARQUIS DEAJON DEWS,

Defendant and Appellant.

F057889

(Super. Ct. No. F08906679)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. James M. Petrucelli, Judge.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lloyd G. Carter and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J., and Gomes, J.

STATEMENT OF THE CASE

On April 28, 2009, appellant, Demarquis Deajon Dews, was charged in a second amended information with robbery (Pen. Code, § 211, count one),¹ making criminal threats (§ 422, count two), and dissuading a witness (§ 136.1, subd. (a)(1), count three). In count one, it was alleged appellant personally used a firearm with the meaning of section 12022.53, subdivision (b), and in count two, it was alleged appellant personally used a firearm within the meaning of section 12022.5, subdivision (a). At the conclusion of a jury trial on May 11, 2009, appellant was found guilty of all three counts and the two enhancements.

On June 9, 2009, the trial court sentenced appellant to prison for five years on count one plus a consecutive term of ten years for the gun use enhancement. The court sentenced appellant to concurrent sentences of three years on count two plus ten years for the gun use enhancement. Appellant was sentenced to a consecutive term of eight months on count three for a total prison sentence of 15 years 8 months. Appellant argues on appeal that the trial court violated section 654 in sentencing him to concurrent sentences on count two and its accompanying gun use enhancement. Respondent concedes the error. We agree with the parties.

FACTS

Jose Quijano was working as a pizza delivery driver on October 12, 2008.² The restaurant received a call from someone who identified himself as Jesse who wanted two large pizzas. The pizzas were to be delivered to 445 East Franklin and the contact

¹ Unless otherwise designated, all statutory references are to the Penal Code.

² Because the only issue on appeal concerns whether section 654 applies to count two, we recount only evidence relevant to that issue, not to the extensive testimony concerning appellant's escape, his subsequent identification, his confession to investigators, to evidence that he attempted to dissuade Quijano's testimony, or to his defense.

telephone number was 250-8191. Quijano tried to make his delivery at about 10:45 p.m., but could not see any addresses so he returned to the restaurant. Quijano had called the contact number for further directions from his own cell phone but did not block his own number.

Quijano received another call asking him where he was because the person wanted his pizzas. Quijano returned to the original location within five minutes and saw codefendant Jesse Vargas, Jr. standing inside a gate. Vargas asked Quijano if he accepted checks. Fearful that the check would be fraudulent, Quijano replied he would not accept it.

As Quijano was talking to Vargas, another person later identified as appellant, came out with a gun. The gun was either a rifle or a shotgun. Appellant's head was covered. Appellant was pointing the gun in Quijano's face. Quijano was shocked.

Appellant asked Quijano for his money, but Quijano told appellant he had no money. Appellant took the pizzas, Quijano's cell phone, and his keys. Appellant looked through Quijano's pockets. Appellant threw Quijano's keys on the lawn and handed him back his cell phone. Quijano told an investigating officer that appellant stated that if Quijano did not give him money, appellant would shoot him.³

SECTION 654

Appellant contends, and respondent concedes, the trial court erred in failing to stay appellant's sentence on count two pursuant to section 654. Section 654 prohibits multiple punishment for a single act or omission and also for a single, indivisible course of criminal conduct. It is the defendant's intent and objective, not the temporal proximity of his or her offenses, that determine if the transaction is indivisible. Offenses that are incidental to, or are the means of accomplishing one criminal objective, can only be punished once. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208; also see *People v.*

³ In closing argument, the prosecutor argued to the jury that evidence of appellant's criminal threat derived from his threat to shoot Quijano if Quijano did not give him money.

Hester (2000) 22 Cal.4th 290, 294.) If section 654 is operative, it applies to sentences that are served concurrently as well as to those served consecutively. (See *People v. Cruz* (1995) 38 Cal.App.4th 427, 434.)

The parties agree that appellant's threat to shoot Quijano unless he gave appellant his money was part of the single objective to rob Quijano. It was part of an indivisible course of criminal conduct to achieve appellant's goals of obtaining money. Furthermore, the prosecutor's argument to the jury that appellant's threat to shoot Quijano constituted a criminal threat. This served as an election by the prosecutor concerning which facts constituted count two. (See *People v. Diaz* (1987) 195 Cal.App.3d 1375, 1381-1383.) The trial court erred in failing to stay appellant's sentence on count two and the accompanying gun use enhancement.

DISPOSITION

The trial court's sentence on count two, the criminal threat allegation, and its accompanying gun use enhancement is reversed. The case is remanded for the trial court to stay its sentence on count two and its accompanying gun use enhancement, prepare an amended abstract of judgment reflecting the change, and forward the amended abstract of judgment to the appropriate authorities. The judgment is otherwise affirmed.